

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

IN RE:

Big Buck Brewery & Steakhouse, Inc.

Case No. 04-56761

Debtor.

Chapter 11

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**Opinion Regarding Objections to Claims 74, 75, 76 & 83**

Michael Eyde filed proofs of claim numbers 75, 76 and 83 in this case. Claim 75, filed October 1, 2004, asserts a secured claim for unliquidated damages related to the debtor's Auburn Hills property. Claim 76, filed October 8, 2004, asserts an unsecured claim for \$182,542.57 based on a Convertible Subordinated Promissory Note, dated January 19, 2000. Claim 83, filed December 6, 2004, asserts a claim for an equitable mortgage in the amount of \$5,576,735.28, related to the Auburn Hills property.

In addition, Land One, LLC, filed proof of claim number 74 on October 1, 2004. This claim asserts a secured claim for \$343,899.24 related to the debtor's Grand Rapids property. On March 4, 2005, Land One, LLC, filed an amended proof of claim regarding the Grand Rapids property. The amended claim is docketed as number 87.

On March 22, 2005, Big Buck Brewery & Steakhouse filed an objection to claims 74, 75, 76 and 83. Big Buck asserts that claim 75 should not be allowed because it is inconsistent with this Court's December 2, 2004 opinion. Big Buck asserts that claim 76 should be subordinated to the secured claim of BBAC, LLC based on the terms of the promissory note. Regarding claim 83, Big Buck asserts that Eyde is judicially estopped from claiming an equitable mortgage in the Auburn

Hills facility due to his testimony that he owned only the land and not the facility itself. Big Buck did not file an objection to claim 74 as amended by claim 87.

The Court agrees that claim 75 is inconsistent with the Court's December 2, 2004, order. Accordingly, the claim is disallowed without prejudice to Eyde's right to re-file it if the Court's December 2, 2004 order is overturned on appeal.

Eyde does not dispute that claim 76 is subordinated to BBAC, LLC. However, Eyde asserts that the subordination of a claim is not a basis for disallowance. The Court agrees. Big Buck's objection to claim 76 is overruled.

Big Buck did not object to claim 74 as amended by claim 87. Accordingly, until the Court rules otherwise upon proper objection, claim 87 is allowed.

Regarding claim 83, Big Buck asserts that Eyde's testimony that his interest was in the Auburn Hills real estate alone is a judicial admission which estops him from now asserting that he has an equitable mortgage in the Auburn Hills facility.

The Court must reject Big Buck's argument that Eyde's prior testimony constitutes a judicial admission that is now binding upon him. "Judicial admissions are formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 829 (6th Cir. 2000) (quoting *In re Fordson Eng'g Corp.*, 25 B.R. 506, 509 (Bankr. E. D. Mich. 1982). See also, *MacDonald v. Gen. Motors Corp.*, 110 F.3d 337, 340 (6th Cir. 1997) (A judicial admission is a "deliberate, clear and unambiguous" statement in a pleading that relieves the opposing party of proving the admitted fact.) Eyde's testimony that he owned the land and not the building simply did not have the effect of relieving Big Buck of proving that fact; indeed, Big Buck asserted that it

owned the property, and the Court agreed. In the alternative, the Court has the discretion to relieve a party of a judicial admission, *McDonald*, 110 F.3d at 340, and certainly Eyde is entitled to that relief in the unique circumstances of this case.

During the May 5, 2005 hearing regarding its objections to claims, Big Buck also argued that judicial estoppel applied to prevent the allowance of claim 83.

The doctrine of judicial estoppel forbids a party “from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.” *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 472-73 (6th Cir.1988) (citations omitted). Judicial estoppel is an equitable doctrine that preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment. *See Scararo v. Central R.R.*, 203 F.2d 510, 513 (3d Cir.1953) (judicial estoppel precludes a party from “playing fast and loose with the courts”). In order to invoke judicial estoppel, a party must show that the opponent took a contrary position under oath in a prior proceeding and that the prior position was accepted by the court. *Reynolds*, 861 F.2d at 472-73.

*Teledyne Indus., Inc. V. N.L.R.B.*, 911 F.2d 1214, 1217-18 (6th Cir. 1990) (footnote omitted). *See also Pennycuff v. Fentress Co. Bd. of Ed.*, 404 F.3d 447, 452-53 (6th Cir. 2005).

Eyde argues that he is not estopped from asserting an equitable mortgage based on his prior testimony because the Court did not accept his position that he owned the land. In fact, Eyde argues, Big Buck is the party attempting to take inconsistent positions.

Big Buck did successfully argue that the lease was actually a disguised sale, but it now wants the Court to rely upon Eyde’s testimony that he owned the land and only leased it to Big Buck.

Accordingly, the Court agrees that the doctrine of judicial estoppel does not prevent Eyde from arguing that he has an equitable mortgage in the Auburn Hills facility.

The Court finds that the following issues require an evidentiary hearing:

- (1) Whether Eyde is entitled to an equitable mortgage in the Auburn Hills property;
- (2) The value of the Auburn Hills property;
- (3) The interest rate; and
- (4) Whether Eyde is entitled to late charges.

The Court will issue an appropriate order.

Entered: May 6, 2005

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Steven Rhodes  
Chief Bankruptcy Judge

c: Christopher Lievois  
Norman C. Witte

Not for Publication